

WC 05-53

DOCKET FILE COPY ORIGINAL BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of)
)
Thrifty Call, Inc.)
Petition for Declaratory Ruling Concerning)
BellSouth Telecommunications, Inc)
)
Tariff F.C.C. No. 1)
)
To: The Commission)

CB/CPD File No. 01-17

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Federal Communications Commission
Office of Secretary

REPLY TO BELL SOUTH'S OPPOSITION

CompTel/ASCENT ("CompTel") hereby responds to BellSouth's Opposition in the above-referenced proceeding ("*Opposition*").¹ CompTel again urges the Commission to reverse or revise the *Declaratory Ruling* issued by the Wireline Competition Bureau ("Bureau"), and to deny BellSouth's *Opposition*.

I. INTRODUCTION

In its *Opposition*, BellSouth has restated the facts it disputed with Thrifty Call underlying this proceeding. Although CompTel has no basis to comment on the underlying factual dispute, it is necessary to remind the Bureau that bad facts make bad law. CompTel members are now left with a *Declaratory Ruling* that significantly alters the manner in which local and interexchange carriers determine call jurisdiction for rating and billing purposes. Because the *Declaratory Ruling's* holding is inconsistent with 15 years of FCC precedent, the Commission should deny BellSouth's *Opposition* and correct the *Declaratory Ruling*.

¹ *In the Matter of Thrifty Call, Inc. Petition for Declaratory Ruling Concerning BellSouth Telecommunications, Inc.*, CB/CPD File No. 01-17, *Declaratory Ruling*, DA 04-3576 (rel. Nov. 12, 2004) ("*Declaratory Ruling*").

In this *Reply*, CompTel only addresses issues raised by BellSouth in its *Opposition*. First, BellSouth is bound by the unambiguous definition of "Customer" in its federal access tariff, and CompTel members must be able to rely on the terms of BellSouth and other ILECs' federal tariffs. Otherwise, the definition of "Customer" and other tariff terms will be determined by the ILECs on an ad-hoc basis, depending on the circumstances. In addition, the Commission should reverse the *Declaratory Ruling's* cart-before-the-horse conclusion that state public utility commissions may apply a different jurisdictional separations process than that mandated by the FCC by permitting retroactive PIU revisions in a manner inconsistent with the Communications Act, Commission precedent and the unambiguous language of BellSouth's interstate access tariff.

I. DISCUSSION

A. Definition of "Customer"

In the *Declaratory Ruling*, the Bureau redefined an unambiguous tariff term in a manner that will affect carriers other than Thrifty Call in very significant ways. And, by needlessly redefining this term, it has undone the entire purpose of PIU reporting.

Despite the blur of elaborate arguments in the *Opposition*, this can be distilled to one simple issue: the definition of "Customer" in BellSouth's federal access tariff. As previously submitted to the Bureau, BellSouth's federal access tariff unambiguously defines "Customer" to mean:

Any individual, partnership, association, joint-stock company, trust, corporation, or governmental entity or other entity which subscribes to the services offered under this tariff, including both Interexchange Carriers (ICs) or End Users.²

² *BellSouth Tariff F.C.C. No. 1*, p. 2-55 (effective Dec. 16, 1996).

There can be no question that "Customer" under BellSouth's tariff means the entity that "subscribes" to BellSouth's services.³ There could be no clearer definition. In this matter, the Customer under BellSouth's tariff is undeniably Thrifty Call.

BellSouth seeks to draw a distinction between "the" Customer and "a" Customer. (Opp. at 4.) This is sophistry. There is no question that Thrifty Call purchased terminating access services, the very services for which BellSouth sought to recover compensation from Thrifty Call. BellSouth seeks to avoid the obvious by claiming that another IXC could be "a" Customer, either BellSouth's customer or the customer of some other LEC for *originating* access services (*Id.*) Therefore, according to BellSouth, for jurisdictional purposes, what matters is where the call entered the network of *any* of the "customers", even if they are not customers of BellSouth's terminating access services or BellSouth's customers for any services.

BellSouth's tariff says no such thing. It does not define a "Customer" as one purchasing some other service or the Customer of some other LEC. "Customer" is defined in reference to the "services" "subscribed to" under the BellSouth tariff. Thus, for the terminating access services at issue, Thrifty Call – *and only Thrifty Call* – was BellSouth's Customer and the only entity relevant for determining where a call entered "the" Customer's network.

Moreover, that BellSouth must stretch its own tariff language this far, even if the Commission were to give this interpretation any credence, demonstrates at best that the term "customer network" in the tariff is ambiguous. However, as we previously noted, if a tariff provision is deemed to be unclear, it must be read in the light most favorable to the purchaser of services under the tariff.⁴

³ *Id.*

⁴ *Commonwealth of Virginia State Corp. Commission v. MCI Tel. Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 10,583, ¶ 20 (2000) (recognizing that "to the extent that there is an ambiguity . . . it is construed against MCI as the drafter of the Tariff.")

B. Retroactive Revisions to PIU as the Basis for Backbilling

BellSouth has also misinterpreted CompTel's argument concerning the *Declaratory Ruling's* backbilling element. CompTel does not dispute that the states have jurisdiction over intrastate access service and related tariffs. Indeed, CompTel does not dispute the Bureau's statement that "given the permissive language of BellSouth's tariff regarding audits and the fact that the parties could not reach an agreement on the terms, conditions, and scope of the audit, it was not unreasonable for BellSouth to seek an alternative resolution of the issues."⁵ Certainly, ILECs have many fora available in which to resolve a dispute – the Commission, federal district court, state agencies, and state courts. CompTel merely asks the Bureau to clarify that issues regarding jurisdictional separations are *exclusively federal* matters. After the federal separations process is completed – meaning the jurisdiction of each minute is determined through the PIU or other federally mandated means -- intrastate minutes may be addressed in a state forum. A state agency, however, may *not* change the jurisdictional character of minutes in a way inconsistent with federal regulations. That means that the State cannot authorize the shift of interstate minutes into the intrastate jurisdiction – i.e., retroactively change the PIU – for periods not authorized by FCC policies and implementing interstate tariffs. Jurisdictional law is clear on this.

In particular, CompTel disputes the *Declaratory Ruling's* two final paragraphs.⁶ Those paragraphs will lead to the same misunderstandings articulated in BellSouth's *Opposition*. In its *Opposition* BellSouth introduces a new BellSouth practice, which it claims is supported by the *Declaratory Ruling*. BellSouth explains that "[i]f a minute were first billed as an interstate

(citing *Halprin, Temple, Goodman, & Sugrue v. MCI Tel. Corp.*, 13 FCC Rcd 22,568 at ¶ 13 (1998)).

⁵ *Declaratory Ruling*, ¶ 23.

⁶ *Id.*, ¶¶ 26-27.

minute and, then, after a finding that the minute is intrastate and should have been billed a full intrastate charge, the customer would be credited with any amount paid under the interstate tariff and would be billed the difference between the interstate charge and the amount the customer paid (assuming the intrastate charge is higher)."⁷ BellSouth relies on the *Declaratory Ruling* for this policy. The *Declaratory Ruling* states that "the backbilling sought by BellSouth from Thrifty Call is based on an underpayment of intrastate access charges due to Thrifty Call's erroneous PIU calculation. Therefore, it was within the North Carolina commission's jurisdiction to determine whether BellSouth provided sufficient evidence to prove its claimed backbilling amount."⁸ Thus, if a state of an LEC's choosing determines implicitly or explicitly that the PIU was wrong, as in Thrifty Call's case, then the state access tariff would apply, and the less favorable federal access rate would not apply – regardless of the fact that this retroactive billing must *by definition* be preceded by retroactive changes to the PIU, changes which are governed by federal policy and interstate tariffs.

CompTel does not support BellSouth's new system of litigating jurisdictional issues at various state commissions and neither should the Commission. CompTel asks that the Commission clarify that when there are minutes in which the jurisdictional nature of a call is unknown, then each carrier – the subscribing customer and the local exchange carrier – must first determine what is jurisdictionally interstate (the EES methodology) and what is jurisdictionally intrastate based on the federal access tariff. This includes not only the methodology for jurisdictional classification of minutes, but also the timeframe for making (and revising) those decisions. Only after referring to the federal tariffs can the LEC seek payment for intrastate traffic.

⁷ *Opposition*, pg. 6.

⁸ *Declaratory Ruling*, ¶ 27.

III. CONCLUSION

For the reasons stated above, the Commission should review and reverse these portions of the *Declaratory Ruling* and deny BellSouth's *Opposition*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This hereby certifies that s/he has served a copy of the foregoing **Reply to BellSouth's Opposition** by placing a copy in the United States mail, first-class postage prepaid, addressed as follows:

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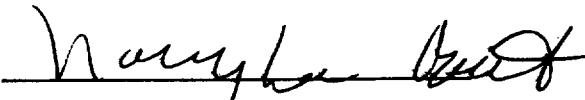
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